IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2436 OF 2007

Odette Mariana Lobo & Ors. ...Petitioners

Versus

Erach Nasarvanji Damania
(deceased through legal heirs & Rep:)
Zarin E. Damania & Ors. ...Respondents

Ms Odette Mariana Lobo Petitioner-in-person present.
Shri Uday Warunjikar for the Respondent Nos.1 to 4.

CORAM : ABHAY S.OKA, J.
DATED : APRIL 21, 2007.

P.C.:

1. I have heard the first Petitioner appearing in person for herself and on behalf of the other Petitioners. The challenge in this Petition under Article 227 of the Constitution of India is to the order dated 20th February, 2007 passed by the learned District Judge, Daman by which an Application for condonation of delay made by the Respondents was allowed subject to payment of costs of Rs.1,000/-. Delay was of about 66 days in preferring the Appeal.

2. The suit filed by the Respondents original Plaintiffs was dismissed and the counter claim filed by the Petitioners was allowed by the Civil Court by

Judgment and Decree dated 28th March, 2003. An application was made by the Respondents original Plaintiffs for obtaining certified copies of the Judgment and Decree on 31st March, 2003. The certified copies were ready on 21st April, 2003. It is the case of the Respondents original Plaintiffs that from 05th May, 2003 to 08th June, 2003 the Court was on summer vacation. On 09th June, 2003 in view of the amended provisions of Rule 9 of Order XLI of the Code of Civil Procedure, 1908, the Appeal against the Judgment and Decree was presented before the same Court which had passed the decree. The Appeal was returned on 31st July, 2003 and was filed in the District Court on the same day.

3. The submission of the first Petitioner appearing in person is that the original Plaintiffs had engaged services of a very seasoned Advocate who ought to have been aware of the decision of the Apex Court in the case of **Salem Advocate Bar Association T.N. Vs. Union of India [(2003) 1 Supreme Court Cases, Page 49]** and therefore, it cannot be said that the error committed of filing the Appeal before the trial Court was a bonafide error. She submitted that the original Plaintiffs have

filed a large number of frivolous proceedings and even the original Plaintiffs were fully aware of the interpretation given by the Apex Court to Rule 9 of Order XLI as the Judgment of the Apex Court was delivered on 25th October, 2002 and was reported in the month of January of the year 2003. She submitted that there was no sufficient cause for condonation of delay. She pointed out that the observations made by the learned District Judge in paragraph No.6 of the impugned order are not only contradictory but are bad in law and therefore, the order passed by the District Court of condoning the delay deserves to be set aside.

3. I have carefully considered the submissions. As stated earlier, from the dates which are mentioned above it is apparent that the period available under the law of limitation for prefering the Appeal expired in summer vacation which was from 05th May, 2003 to 08th June, 2003. Thus, Appeal could have been presented on the day of re-opening i.e on 09th June, 2003. It is not in dispute that the Appeal was presented on that day but it was presented before the same Court which had passed the decree by misinterpreting the Rule 9 of Order XLI. The case of the original Plaintiffs is that as per the

advise of a very senior Advocate the Appeal was lodged before the trial Court. The original plaintiffs cannot be blamed if they acted as per the legal advice. The memorandum of Appeal was returned on 31st July 2003 for presentation to the proper Court and on the very day the same was filed in the District Court.

4. If the aforesaid facts which are borne out from the record are considered, it is very difficult to interfere with the impugned order by which a delay of 66 days in preferring a substantive Appeal was condoned. Hence, the Petition is rejected.

JUDGE